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CALIFORNIA OFFICE OF ADMINISTRATIVE LAW
SACRAMENTO, CALIFORNIA

MARION FONG EU
SECRETARY OF STATE
OF CALIFORNIA

In re:)	1991 OAL Determination No. 4
Request for Regulatory)	
Determination filed by)	[Docket No. 90-006]
Paul W. Comiskey,)	
Attorney at Law,)	April 1, 1991
concerning the Department)	
of Corrections' policy of)	Determination Pursuant to
not sending notices of)	Government Code Section
proposed rulemaking to)	11347.5; Title 1, California
inmates who request them)	Code of Regulations,
pursuant to Government)	Chapter 1, Article 3
Code Section 11346.4 ¹)	
)	

Determination by: JOHN D. SMITH, Interim Director

Herbert F. Bolz, Coordinating Attorney
Mathew Chan, Staff Counsel
Rulemaking and Regulatory
Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law is whether or not a policy of the Department of Corrections to not send notices of its proposed regulatory actions to inmates who request them is a "regulation" and therefore without legal effect unless adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that the challenged policy is a "regulation." The Department of Corrections has declared that, as of Spring 1990, the policy regarding inmate notification of regulatory actions has been changed; the Department's present policy is to place on its mailing list for "Notice(s) of Proposed Rulemaking" those inmates who make a written request for personal notice.

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THE ISSUE PRESENTED ²

The Office of Administrative Law ("OAL") has been requested to determine³ whether or not a policy adopted by the Department of Corrections ("Department") to not send notices of its proposed regulatory action to inmates who request them pursuant to Government Code Section 11346.4 is a "regulation" required to be adopted pursuant to the Administrative Procedure Act ("APA").

THE DECISION ^{4, 5, 6, 7, 8}

OAL finds that:

- (1) the Department's quasi-legislative enactments are generally required to be adopted pursuant to the APA;
- (2) the Department's policy is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b);
- (3) no exceptions to the APA requirements apply;
- (4) the Department's policy violates Government Code section 11347.5, subdivision (a).⁹

R E A S O N S F O R D E C I S I O N

I. APA; RULEMAKING AGENCY; AUTHORITY; BACKGROUND

The APA and Regulatory Determinations

In Grier v. Kizer, the California Court of Appeal described the APA and OAL's role in that Act's enforcement as follows:

"The APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations promulgated by the State's many administrative agencies. (Stats. 1947, ch. 1425, secs. 1, 11, pp. 2985, 2988; former Gov. Code section 11420, see now sec. 11346.) Its provisions are applicable to the exercise of any quasi-legislative power conferred by statute. (Section 11346.) The APA requires an agency, inter alia, to give notice of the proposed adoption, amendment, or repeal of a regulation (section 11346.4), to issue a statement of the specific purpose of the proposed action (section 11346.7), and to afford interested persons the opportunity to present comments on the proposed action (section 11346.8). Unless the agency promulgates a regulation in substantial compliance with the APA, the regulation is without legal effect. (Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 583 P.2d 744).

"In 1979, the Legislature established the OAL and charged it with the orderly review of administrative regulations. In so doing, the Legislature cited an unprecedented growth in the number of administrative regulations being adopted by state agencies as well as the lack of a central office with the power and duty to review regulations to ensure they are written in a comprehensible manner, are authorized by statute and are consistent with other law. (Sections 11340, 11340.1, 11340.2)." [Footnote omitted; emphasis added.]¹⁰

In 1982, recognizing that state agencies were for various reasons bypassing OAL review (and other APA requirements), the Legislature enacted Government Code section 11347.5. Section 11347.5, in broad terms, prohibits state agencies from issuing, utilizing, enforcing or attempting to enforce agency rules which should have been, but were not, adopted pursuant to the APA. This section also provides OAL with the authority to issue a regulatory determination as to whether a challenged state agency rule is a "regulation" as defined in subdivision (b) of Government Code section 11342.

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The Rulemaking Agency Named in this Proceeding

California's first, and for many years only, prison was located at San Quentin on San Francisco Bay. As the decades passed, the state established additional institutions, leading to an increased need for uniform statewide rules. Ending a long period of decentralized prison administration, the Legislature created the California Department of Corrections in 1944.¹¹ The Legislature has entrusted the Director of Corrections with a "difficult and sensitive job,"¹² namely:

"[t]he supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein" ¹³

Authority ¹⁴

Penal Code section 5058, subdivision (a), provides in part:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. . . ." [Emphasis added.]

General Background: The Department's Three Tier Regulatory Scheme

The Department of Corrections was traditionally considered exempt from codifying any of its rules and regulations in the California Code of Regulations ("CCR"). This policy has changed dramatically in the past 15 years, in part reflecting a broader trend in which legislative bodies have addressed "deep seated problems of agency accountability and responsiveness"¹⁵ by generally requiring administrative agencies to follow certain procedures, notably public notice and hearing, prior to adopting administrative regulations.

"The procedural requirements of the APA," the California Court of Appeal has pointed out, "are designed to promote fulfillment of its dual objectives--meaningful public participation and effective judicial review."¹⁶ Some legislatively mandated requirements reflect a concern that regulatory enactments be supported by a complete rulemaking record, and thus be more likely to withstand judicial scrutiny.¹⁷

The Department has for many years used a three-tier regulatory scheme to carry out its duties under the California Penal Code. The first tier consists of the "Director's Rules," a relatively brief collection of

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statewide "general principles," which were adopted pursuant to the APA and are currently contained in about 180 CCR pages. The Director's Rules were placed in the CCR in response to a 1976 legislative mandate which explicitly directed the Department to adopt its rules as regulations pursuant to the APA.¹⁸

For many years, the second tier consisted of the "family of manuals," a group of six "procedural" manuals containing additional statewide rules supplementing the Director's Rules.¹⁹ The manuals are the Classification Manual, the Departmental Administrative Manual, the Business Administration Manual, the Narcotic Outpatient Program Manual, the Parole Procedures Manual-Felon, and the Case Records Manual. In 1987, a completely revised Parole and Community Services Division ("PCSD") Operations Manual replaced both the Parole Procedures Manual-Felon and the Narcotic Addict Outpatient Program Manual. The Department is currently in the process of reviewing all existing procedural manuals and operations plans, with the objective of transferring all regulatory material from manuals into the CCR, and combining all six existing manuals into a single, more concise "CDC Operations Manual." So far, Volumes I, II, III, V, VI, VII, and VIII of the new "CDC [California Department of Corrections] Operations Manual" have been issued.

Manuals are updated by "Administrative Bulletins," which often include replacement pages for modified manual provisions. Manuals are intended to supplement CCR provisions. The Preface to Chapter 1, Division 3, Title 15 of the CCR states in part:

"Statements of policy contained in the rules and regulations of the director will be considered as regulations. Procedural detail necessary to implement the regulations is not always included in each regulation. Such detail will be found in appropriate departmental procedural manuals and in institution operational plans and procedures."

Court decisions have struck down portions of the second tier--the Classification Manual²⁰ and parts of the Administrative Manual²¹ (and unincorporated "Administrative Bulletins"²²)--for failure to comply with APA requirements.²³ OAL regulatory determinations have found the Classification Manual,²⁴ several portions of the Administrative Manual,²⁵ and several portions of the Case Records Manual²⁶ to violate Government Code section 11347.5.²⁷

The third tier of the regulatory scheme consists of hundreds (perhaps thousands) of "operations plans," drafted by individual wardens and superintendents and approved by the Director.²⁸ These plans often repeat parts of statutes,

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Director's Rules (i.e., codified regulations), and procedural manuals.²⁹

Background: This Request for Determination

Among the "basic minimum" procedures³⁰ established by the APA is the requirement that notice of the proposed regulatory action be given to the public. In this regard, Government Code section 11346.4, subdivision (a), states:

"At least 45 days prior to the hearing and close of the public comment period on the adoption, amendment, or repeal of a regulation, notice of the proposed action shall be:

(1) Mailed to every person who has filed a request for notice of regulatory action with the state agency." [Emphasis added.]

Subdivision (f) of that same section states:

"Where the form or manner of notice is prescribed by statute in any particular case, in addition to filing and mailing notice as required by this section, the notice shall be published, posted, mailed, filed, or otherwise publicized as prescribed by that statute."

On January 31, 1990, Paul W. Comiskey ("Requester"), Attorney at Law, submitted to OAL a Request for Determination ("Request") challenging the Department's policy concerning notification of its rulemaking actions to interested inmates. The Request stated in part:

"The California Department of Corrections has adopted a policy of refusing to send O.A.L. notices of proposed regulatory actions to prison inmates who request them. They have adopted a number of other procedures which they claimed fulfill the law requirements. They post notices of proposed changes on bulletinboards [sic], make them available in the law library, have the gun officers in certain security housing units have them available to show prisoners, and use a number of other methods, they refuse to add a prisoner's name to the list and send him a notice when he requests. It is my opinion that this refusal constitutes a policy that they have established and that policy is a "regulation" for the purposes of 11342 of the

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Government Code. It is a policy that they have adopted. . . . [emphasis added.]

". . . The enclosures I am submitting will show you that this is a policy and will also show you all of the different means that they have tried to use to avoid doing what is legally required."

Included as enclosures were copies of several "Director Level Decisions" of inmate administrative grievances. In each instance, the issue determined was whether or not the inmate should be personally notified of the Department's proposed rule changes. We find it curious that although all of the submitted Director Level Decisions involved the same issue, were all prepared within months of one another, and were signed by the same person,³¹ different provisions were cited as support for the Department's position that its notice policy conforms with current legal mandates.

The Director Level Decision involving inmate Lawrence Bittaker, dated March 29, 1989, cited Departmental Administrative Manual, section 210.³² The Decision stated in part:

"The Department's rule regarding Notice of Intent to Revise the Rules is contained in the Department Administrative Manual, Section 210(a), (b), (c), and (d).

"Section 210. Notice of Intent to Revise the Rules.

"(a) Government Code Section 11346.4 requires that at least 45 days prior to the holding of a public hearing on proposed rule revisions a notice be published in the California Administrative Notice Register and mailed to interested persons.

"(b) To comply with the above requirement, since it is not possible to mail individual notices to inmates and staff, it is the department's policy that such notices be posted in institutions... at least 45 days before the scheduled hearings. Accompanying the notice mailed to the institutions...in bulk supply will be the informative digest,

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statement of reasons and the text of the proposed rule revision(s) in strikeout and underscore. The notice will give the date, time and place of the hearing. [Emphasis added.]

"(c) No later than five days after receipt of the notice and accompanying documents, the rule coordinator will post the documents throughout the institution or facility in conspicuous places accessible to staff and inmates and at a location accessible to visitors...The notice is to remain posted until the date of the scheduled hearing or the final date shown on the notice for submission of responses.

"(d) Inmates whose housing status precludes access to the posted copies may review a copy by requesting it from the inmates law library.'

". . . In as much as appellant's needs can be met through this procedure, his request to be placed on the mailing list is without merit."

A different provision was cited in the Director Level Decision involving inmate Marcos Castaneda, dated April 20, 1989. That Decision stated:

"The Department's rule regarding posting of proposed rule changes is contained in the Department Administrative Manual, Chapter 200, Article 3, Section 226(b).

"Penal Code Section 5058(c)(1) requires that no less than 20 days prior to the effective date, copies of the rules and regulations shall be posted in conspicuous places throughout the institution and mailed to persons and organizations who have requested them. The Director's rule revision bulletin is used for this purpose. Posting should be done immediately upon receipt.'"

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Still another provision was relied upon in the Director Level Decision involving inmate Curtis Morrison, dated June 28, 1989. That Decision stated in part:

. . . Any and all changes in any rule or regulation that affects an inmate's length and/or condition of confinement are posted in conspicuous places in each housing unit of the institution and copies of all changes are retained in the law library. . . .

"The Department's rules regarding legal materials are contained in the California Code of Regulations (CCR), Title 15, Sections 3002(a), 3121 and 3160.

"3002(a). 'Within 14 days of reception...or upon return to confinement...every inmate...shall be issued a copy of the Rules and Regulations of the Director...and copies of all rule changes..."

"3121. 'Each institution will designate a suitable area as the inmate law library. Such area will contain space to accommodate state-owned law books and to allow individual study... Law books are defined to include constitutions, codes, court reports, legal texts and law dictionaries. An institution's approved plan of library operation shall contain provisions for access to law library services for all inmates regardless of their housing status or level of custody.'

"3160. 'Inmates will be allowed unrestricted access to the courts...'"

The various provisions cited by the Department in support of the challenged policy of not sending notices of regulatory actions to inmates that request them were not specifically challenged in the Request. However, a finding that the challenged policy is a "regulation" in violation of Government Code section 11347.5, subdivision (a), necessitates a similar finding with respect to any portion of the above-cited provisions which reflect that policy.

II. ISSUES

Before addressing the key issues before us, we first dispense with the Department's argument that this determination is moot. In its response to the Request for Determination ("Response"), the Department stated that, as

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of Spring 1990, its policy "is to place on its mailing list for "Notice(s) of Proposed Rulemaking" those inmates who make a written request." It is noteworthy that the Department did not deny that the challenged policy had previously existed.³³ In essence, the Department announced the rescission of its policy of not sending notices to inmates that requests them. Such a rescission, however, does not render this determination moot.

Like any other state agency, OAL is bound to follow its own regulations.³⁴ Section 126 of Title 1 of the California Code of Regulations, adopted by OAL in 1985, states:

"Within 75 days of the date of publication of the notice regarding the commencement of active consideration of the request for determination, the office shall issue a written determination as to whether the state agency rule is a regulation, along with the reasons supporting the determination."
[Emphasis added.]

In this instance, a summary of the Request for Determination was published on August 31, 1990 and a notice of active consideration was mailed to the parties on September 6, 1990. The language of section 126, therefore, mandates that OAL issue this written determination.

In addition, this Determination serves to invalidate the Department's previous policy of not sending notices of rulemaking actions to inmates that had requested them and will deter the Department from again implementing such a policy.

We now turn to the three main issues before us:³⁵

- (1) WHETHER THE APA IS GENERALLY APPLICABLE TO THE DEPARTMENT'S QUASI-LEGISLATIVE ENACTMENTS.
- (2) WHETHER THE CHALLENGED POLICY CONSTITUTES A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (3) WHETHER THE CHALLENGED POLICY FALLS WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE APA IS GENERALLY APPLICABLE TO THE DEPARTMENT'S QUASI-LEGISLATIVE ENACTMENTS.

The Department is a "state agency" as that term is defined in Government Code section 11000.³⁶ Government Code section

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11342, subdivision (b), clearly indicates that, for purposes of the APA, the term "state agency" applies to all state agencies, except those in the "judicial or legislative departments."³⁷ Since the Department is in neither the judicial nor legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Department.³⁸

In addition, Penal Code section 5058, subdivision (a), provides in part:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. The rules and regulations shall be promulgated and filed pursuant to [the APA]" [Emphasis added.]

SECOND, WE INQUIRE WHETHER THE CHALLENGED POLICY CONSTITUTES A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b), defines "regulation" as:

". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['regulation'] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]"
[Emphasis added.]

In Grier v. Kizer,³⁹ the California Court of Appeal upheld OAL's two-part test as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b):

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First, is the challenged rule either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

If an uncodified rule fails to satisfy either of the above two parts of the test, we must conclude that it is not a "regulation" and not subject to the APA. In applying this two-part test, however, we are mindful of the admonition of the Grier court:

" . . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (Armistead, supra, 22 Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the view that any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA." [Emphasis added.]⁴⁰

A. Part One - Does the Challenged Policy Establish A Rule or Standard of General Application or a Modify or Supplement Such a Rule?

The answer to the first part of the inquiry is "yes."

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.⁴¹ It has been judicially held that "rules significantly affecting the male prison population" are of general application.⁴²

The challenged policy undoubtedly applies to all members of a class, specifically, all inmates requesting written notice of the Department's rulemaking changes.

B. Part Two - Does the Challenged Policy Establish A Rule Which Interprets, Implements, or Makes Specific the Law Enforced or Administered by the Agency or Which Govern the Agency's Procedure?

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There can be little argument that a policy of refusing to mail notice of the Department's rulemaking action to inmates requesting such notice is a rule which interprets and implements the above-quoted Government Code section 11346.4, subdivision (a)(1).⁴³

We thus conclude that the challenged policy is a "regulation" within the meaning of the key provision of Government Code section 11342, subdivision (b).⁴⁴

THIRD, WE INQUIRE WHETHER THE CHALLENGED POLICY FALLS WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO THE APA REQUIREMENTS.

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless expressly exempted by statute.⁴⁵ Rules concerning certain specified activities of state agencies -- e.g., "internal management" -- are not subject to the procedural requirements of the APA.⁴⁶

The question of whether or not a policy or rule falls within the "internal management" exception has been discussed in several previous Determinations.⁴⁷ At first blush, one might be tempted to argue that the challenged policy is an administrative rule governing the internal management of prisons. A review of the relevant case law, however, reveals the weakness of that argument. Courts have uniformly limited the "internal management" exception to a very narrow class of rules^{48, 49} -- i.e., the exception applies if the "regulation" under review (1) affects only the employees of the issuing agency^{50, 51} and (2) does not address a matter of serious consequence involving an important public interest.^{52, 53}

The challenged policy herein does not merely affect the employees of the Department; instead, it affects the entire inmate population. The challenged policy also addresses a matter of serious consequence. Knowledge of the Department's rulemaking actions provides inmates with the opportunity to comment on proposed regulations which may directly affect their treatment in prison. The challenged policy reduces the inmates' opportunity for notice and thus impairs on their opportunity for comment. Accordingly, the "internal management" exception would not apply.

Our review also discloses that no other exceptions would apply to the challenged policy. Having found the Department's policy to be a "regulation" and not exempt from the requirements of the APA, we conclude that the policy violates Government Code section 11347.5, subdivision (a).

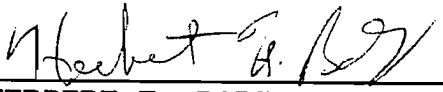
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III. CONCLUSION

For the reasons set forth above, OAL finds that:

- (1) the Department's quasi-legislative enactments are generally required to be adopted pursuant to the APA;
- (2) the Department's policy is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b);
- (3) no exceptions to the APA requirements apply;
- (4) the Department's policy violates Government Code section 11347.5, subdivision (a).

DATE: April 1, 1991


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1. This Request for Determination was filed by Paul W. Comiskey, Attorney at Law, 1909 Sixth Street, Sacramento, CA 95814, (916) 325-2701. The Department of Corrections was represented by Marc D. Remis, Staff Counsel, Legal Affairs Division, P. O. Box 942883, Sacramento, CA 94283-0001, (916) 445-0495.

To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination, as filed with the Secretary of State and as distributed in typewritten format by OAL, is "76" rather than "1." Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

2. The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16, typewritten version, notes pp. 1-4. See also Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, 249-250, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990 (APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of state administrative regulations).

In August 1989, a second survey of governing case law was published in 1989 OAL Determination No. 13 (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

In November 1990, a third survey of governing case law was published in 1990 OAL Determination No. 12 (Department of Finance, November 2, 1990, Docket No. 89-019 [printed as "89-020"]), California Regulatory Notice Register 90, No. 46-Z, page 1693, note 2. The third survey included (1) five appellate court cases which were decided during 1989 and 1990, and (2) two California Attorney General opinions: one opinion issued before the enactment of Government Code section 11347.5, and the other opinion issued thereafter.

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Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121(a), provides:

"'Determination' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(b), which is invalid and unenforceable unless

(1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,

(2) it has been exempted by statute from the requirements of the APA." [Emphasis added.]

See Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990 (finding that Department of Health Services' audit method was invalid and unenforceable because it was an underground regulation which should be adopted pursuant to the APA); and Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4. In a recent case, the Second District Court of Appeal, Division Three, held that a Medi-Cal audit statistical extrapolation rule utilized by the Department of Health Services must be adopted pursuant to the APA. Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244. Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5, OAL issued a determination concluding that the audit rule did meet the definition of "regulation," and therefore was subject to APA requirements. 1987 OAL Determination No. 10 (Department of Health Services, Docket No. 86-016, August 6, 1987). The Grier court concurred with OAL's conclusion.

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The Grier court stated that the

"Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b). [Citations.]" (219 Cal.App.3d at p. 434, 268 Cal.Rptr. at p. 251.)

Concerning the treatment of 1987 OAL Determination No. 10, which was submitted to the court for consideration in the case, the court further found:

"While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]' [Citations.] [Par.] Because [Government Code] section 11347.5, subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b), we accord its determination due consideration." [Id.; emphasis added.]

The court also ruled that OAL's Determination, that "the audit technique had not been duly adopted as a regulation pursuant to the APA, . . . [and therefore] deemed it to be an invalid and unenforceable 'underground' regulation," was "entitled to due deference." [Emphasis added.]

Other reasons for according "due deference" to OAL determinations are discussed in note 5 of 1990 OAL Determination No. 4 (Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket No. 89-010), California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384.

5. Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rule-making agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point

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and to permit OAL to devote its resources to analysis of truly contested issues.

On August 31, 1990, OAL published a summary of this Request for Determination in the California Regulatory Notice Register, along with a notice inviting public comment. No public comments were submitted. The Department, however, did submit a response to the Request for Determination ("Response").

6. If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)
7. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.
8. We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL's Information Services Unit for \$3.00 (\$4.65 if mailed).

9. Government Code section 11347.5 provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['']regulation[''] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion,

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bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a [']regulation['] as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.
2. Make its determination known to the agency, the Governor, and the Legislature.
3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.
4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.
2. The proceeding began prior to the party's request for the office's determination.
3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction,

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order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation['] as defined in subdivision (b) of Section 11342."

[Emphasis added.]

10. Grier v. Kizer, (1990) 219 Cal.App.3d 422, 431, 268 Cal.Rptr. 244, 249.
11. Penal Code section 5000.
12. Enomoto v. Brown (1981) 117 Cal.App.3d 408, 414, 172 Cal.Rptr. 778, 781.
13. Penal Code section 5054.
14. We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such

public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

15. California Optometric Association v. Lackner (1976) 60 Cal.App.3d 500, 511, 131 Cal.Rptr. 744, 751.

16. Id.

17. For instance, Government Code section 11346.7, subdivision (b), requires a "final statement of reasons" for each regulatory action.

18. Section 3 of Statutes of 1975, chapter 1160, at page 2876, states:

"It is the intent of the Legislature that any rules and regulations adopted by the Department of Corrections . . . prior to the effective date of this act [January 1, 1976], shall be reconsidered pursuant to the provisions of the Administrative Procedure Act before July 1, 1976." [Emphasis added.]

19. Manuals are intended to supplement CCR provisions. The Preface to Chapter 1, titled "Rules and Regulations of the Director of Corrections" (Title 15, Division 3, of the CCR), states in part:

"Statements of policy contained in the rules and regulations of the director will be considered as regulations. Procedural detail necessary to implement the regulations is not always included in each regulation. Such detail will be found in appropriate departmental procedural manuals and in institution operational plans and procedures." [Emphasis added.]

[This language first appeared in the CCR in May of 1976. (California Administrative Notice Register 76, No. 19, May 8, 1976, p. 401.) The Preface, and the quotation, were printed in the CCR in response to the legislative requirement stated in section 3 of Statutes of 1975, chapter 1160, page 2876 (the uncodified statutory language accompanying the 1976 amendment to Penal Code section 5058). As shown by the dates, this language was added to the CCR prior to the decision in Armistead v. State Personnel Board ((1978) 22 Cal.3d 198, 149 Cal.Rptr. 1) and subsequent case law, prior to the creation of OAL,

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and prior to the enactment of Government Code section 11347.5.]

The Departmental Administrative Manual makes clear in general that local institutions are expected to strictly adhere to the supplementary rules appearing in departmental procedural manuals, and specifically requires that local operations plans are to be consistent with the statewide procedural manuals.

According to section 102(a) of the Administrative Manual:

"[i]t is the policy of the Director of Corrections that all institutions . . . under the jurisdiction of the Department . . . shall . . . observe and follow established departmental goals and procedures as reflected in departmental manuals" [Emphasis added.]

Section 240(c) of the Administrative Manual states:

"While the policies and procedures contained in the procedural manuals are as mandatory as the Rules and Regulations of the Director of Corrections, the directions given in a manual shall avoid use of the words 'rule(s)' or 'regulation(s)' except to refer to the Director's Rules or the rules and regulations of another governmental agency." [Emphasis added.]

20. Stoneham v. Rushen ("Stoneham I") (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Stoneham v. Rushen ("Stoneham II") (1984) 156 Cal.App.3d 302, 203 Cal.Rptr. 20; and Herships & Oldfield v. McCarthy (Super. Ct. Sacramento County, 1987, No. 350531, order issuing injunction regarding Classification Manual filed June 1, 1987.)
21. Hillery v. Rushen (9th Cir. 1983) 720 F.2d 1132; Faunce v. Denton (1985) 167 Cal.App.3d 191, 213 Cal.Rptr. 122.
22. Stoneham v. Rushen ("Stoneham I") (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Stoneham v. Rushen ("Stoneham II") (1984) 56 Cal.App.3d 302, 203 Cal.Rptr. 20.
23. These adverse decisions concerning regulatory "second tier" material have not been unexpected. The author of the successful 1975 bill rejected an amendment proposed by the Department which would have specifically excluded the statewide procedural manuals from the APA adoption requirement.

Later, a Youth and Adult Correctional Agency bill analysis dated May 5, 1981, unsuccessfully opposed AB 1013, the bill which resulted in the enactment of Government Code section

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11347.5. This analysis contained a warning that the proposed legislation "could result in a great part of our [i.e., Department of Corrections'] procedural manuals going under the Administrative Procedure Act process"

24. 1987 OAL Determination No. 3 (Department of Corrections, March 4, 1987, Docket No. 86-009), California Administrative Notice Register 87, No. 12-Z, March 20, 1987, p. B-74.
25. 1987 OAL Determination No. 15 (Department of Corrections, November 19, 1987, Docket No. 87-004), California Administrative Notice Register 87, No. 49-Z, December 4, 1987, p. 872 (sections 7810-7817, Administrative Manual); 1988 OAL Determination No. 2 (Department of Corrections, February 23, 1988, Docket No. 87-008), California Regulatory Notice Register 88, No. 10-Z, March 4, 1988, p. 720 (chapters 2900 and 6500, section 6144, Administrative Manual); 1988 OAL Determination No. 6 (Department of Corrections, April 27, 1988, Docket No. 87-012), California Regulatory Notice Register 88, No. 20-Z, May 13, 1988, p. 1682 (chapter 7300, Administrative Manual); 1989 OAL Determination No. 11 (Department of Corrections, July 25, 1989, Docket No. 88-014), California Regulatory Notice Register 89, No. 30-Z, August 11, 1989, p. 2563 (sections 510, 511 and 536-541, Administrative Manual). Portions of the above-noted chapters and sections were found not to be "regulations."
- Compare with 1989 OAL Determination No. 9 (Department of Corrections, May 18, 1989, Docket No. 88-011), California Regulatory Notice Register 89, No. 22-Z, June 2, 1989, p. 1625 (section 2708, Administrative Manual -- held to be exempt from APA requirements).
26. 1988 OAL Determination No. 19 (Department of Corrections, November 18, 1988, Docket No. 87-026), California Regulatory Notice Register 88, No. 49-Z, December 2, 1988, p. 3850 (subsections 1002(b) and (c), and 1053(b) of the Case Records Manual were found to be regulatory; subsections 1002(a) and (d), and 1053(a) were found not to be regulatory). 1989 OAL Determination No. 3 (Department of Corrections, February 21, 1989, Docket No. 88-005), California Regulatory Notice Register 89, No. 9-Z, March 3, 1989, p. 556 (Chapters 100 through 1900, noninclusive, of the Case Records Manual were found to be regulatory except for those sections which were either nonregulatory or were restatements of existing statutes, regulations, or case law).
27. Other challenged rules which do not neatly fall within the Department's three-tiered regulatory scheme have also been the subject of OAL determinations. 1989 OAL Determination No. 5 (Department of Corrections, April 5, 1989, Docket No. 88-007), California Regulatory Notice Register 89, No. 16-

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Z, April 21, 1989, p. 1120 (memo issued by Department official held exempt from APA); 1989 OAL Determination No. 6 (Department of Corrections, April 19, 1989, Docket No. 88-008), California Regulatory Notice Register 89, No. 18-Z, May 5, 1989, p. 1293 (unwritten rule held to violate Government Code section 11347.5).

28. These operations plans are authorized in a duly-adopted regulation. Title 15, CCR, section 3380, subsection (c), specifically provides:

"Subject to the approval of the Director of Corrections, wardens, superintendents and parole region administrators will establish such operational plans and procedures as are required by the director for implementation of regulations and as may otherwise be required for their respective operations. Such procedures will apply only to the inmates, parolees and personnel under the administrator." [Emphasis added.]

Section 242 ("Local Operational Procedures") of the Administrative Manual provides in part:

"Each institution . . . shall operate in accordance with the departmental procedural manuals, and shall develop local policies and procedures consistent with departmental procedures and goals.

"(a) Each institution . . . shall establish local procedures for all major program operations.

". . . ."

"(b) Procedures shall be consistent with laws, rules, and departmental administrative policy" [Emphasis added.]

These sets of rules issued by individual wardens or superintendents are known variously as "local operational procedures," "operations plans," "institutional procedures," and other similar designations. (See Administrative Manual section 242(d).) We simply refer to these documents as "operations plans."

29. The Department's current review process of its manuals includes eliminating the duplicative material in the local "operations plans," while retaining in these plans material concerning unique local conditions.
30. Government Code section 11346.

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31. Each of the Director Level Decision were signed by Jack R. Reagan, Chief, Inmate Appeals Branch. The appeals, however, were reviewed by different Appeals Examiners.
32. The Director Level Decision involving inmate William F. Stone, dated the same day, also cites to Departmental Administrative Manual, section 210.
33. Also submitted with the Request was a copy of a letter to the Requester, dated November 21, 1989, from Marc D. Remis (the staff attorney representing the Department in this Determination). In addressing the issue of complaints alleging the limited availability of OAL notices of proposed regulatory action and the Department's failure to respond to requests for personal copies of notice to be sent to inmates that requests them, Mr. Remis stated:

"Existing departmental policy is to provide 'Notices of Proposed Regulatory Action' on bulletin boards and in law libraries at each institution and housing unit." [Emphasis Added.]

34. See, Memorial, Inc. v. Harris (9th Cir. 1980) 655 F.2d 905, 910, fn. 14.
35. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); and cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.
36. Government Code section 11000 states in part:

"As used in this title [Title 2. Government of the State of California] 'state agency' includes every state office, officer, department, division, bureau, board, and commission."

Section 11000 is contained in Title 2, Division 3 (Executive Department), Part 1 (State Department and Agencies), Chapter 1 (State Agencies) of the Government Code.

37. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete discussion of the rationale for the "APA applies to all agencies" principle, see 1989 OAL Determination No. 4 (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory

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Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.

38. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.
39. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251.
40. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.
41. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).
42. Stoneham v. Rushen ("Stoneham I") (1982) 137 Cal.App.3d 729, 736 188 Cal.Rptr. 130, 135; Hillery v. Rushen (9th Cir. 1983) 720 F.2d 1132, 1135; Stoneham v. Rushen ("Stoneham II") (1984) 156 Cal.App.3d 302, 309-310, 203 Cal.Rptr. 20, 24; Faunce v. Denton (1985) 167 Cal.App.3d 191, 196, 213 Cal.Rptr. 122, 125.
43. It is a general rule of statutory construction that when statutory language is clear and unambiguous, there is no need for construction. (Solberg v. Superior Court (1977) 29 Cal.3d 182, 198, 137 Cal.Rptr. 460, 470.) "If the language is clear, there can be no room for interpretation; effect must be given to the plain meaning of the words." (Building Industry Assn. v. City of Camarillo (1986) 41 Cal.3d 810, 818, 226 Cal.Rptr. 81, 86.)

The use of the term "every person" in Government Code section 11346.4, subdivision (a)(1), appears undeniably clear; it includes inmates.

44. The challenged policy also impacts on the Department's ability to comply with the APA. Section 86 of Title 1 of the CCR requires the rulemaking agency to provide in its rulemaking record a statement confirming that it complied with the mailing of notice provisions in Government Code section 11346, subdivision (a)(1) through (4) -- i.e., that it mailed notices to every person that requested them at least 45 days prior to public hearing or close of the public comment period. Implementation of the challenged policy would preclude the Department from honestly making such a statement.

45. Government Code section 11346.
46. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:
- a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)
 - b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)
 - c. Rules that "[establish] or [fix] rates, prices, or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
 - d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
 - e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)
 - f. There is limited authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see Del Mar Canning Co. v. Payne (1946) 29 Cal.2d 380, 384 (permittee's agreement to abide by the rules in application may be assumed to have been forced on him by agency as a condition required of all applicants for permits, and in any event should be construed as an agreement to abide by the lawful and valid rules of the commission); see International

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Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

Items a, b, and c, which are drawn from Government Code section 11342, subdivision (b), may also correctly be characterized as "exclusions" from the statutory definition of "regulation"--rather than as APA "exceptions." Whether or not these three statutory provisions are characterized as "exclusions," "exceptions," or "exemptions," it is nonetheless first necessary to determine whether or not the challenged agency rule meets the two-pronged "regulation" test: if an agency rule is either not (1) a "standard of general application" or (2) "adopted . . . to implement, interpret, or make specific the law enforced or administered by [the agency]," then there is no need to reach the question of whether the rule has been (a) "excluded" from the definition of "regulation" or (b) "exempted" or "excepted" from APA rulemaking requirements. Also, it is hoped that separately addressing the basic two-pronged definition of "regulation" makes for clearer and more logical analysis, and will thus assist interested parties in determining whether or not other uncodified agency rules violate Government Code section 11347.5. In Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990, the Court followed the above two-phase analysis.

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Tande' Montez), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of \$162.

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Though the quarterly Determinations Index is not published in the Notice Register, OAL accepts standing orders for Index updates. If a standing order is submitted, OAL will periodically mail out Index updates with an invoice.

47. E.g., 1990 OAL Determination 14 (Department of Corrections, November 2, 1990, Docket No. 89-021), CRNR 90, No. 47-Z, November 23, 1990, p. 1733; 1989 OAL Determination No. 15 (Department of Fair Employment and Housing, October 10, 1989, Docket No. 89-002), CRNR 89, No. 42-Z, October 20, 1989, p. 3029.
48. See Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 206-207, 149 Cal.Rptr. 1; Stoneham v. Rushen ("Stoneham I") (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Poschman v. Dumke (1983) 31 Cal.App.3d 932, 942-943, 107 Cal.Rptr. 596; Grier v. Kizer (1990) 219 Cal.App.3d 422, 436, 440, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990; 1987 OAL Determination No. 13 (Board of Prison Terms, September 30, 1987, Docket No. 87-002), California Administrative Notice Register 87, No. 42-Z, October 16, 1987, pp. 451-453, typewritten version pp. 7-9.
49. It has been argued that Americana Termite Co. v. Structural Pest Control Board (1988) 199 Cal.App.3d 230, 244 Cal.Rptr. 693, supports the proposition that an agency's policy decisions fall within the "internal management" exception. As we discussed at some length in 1990 OAL Determination No. 18 ((Board of Podiatric Medicine, December 26, 1990, Docket No. 90-001), CRNR 91, No. 2-Z, p. 82, 86-88), the dicta in Americana Termite is misleading and should not be relied upon.
50. Id., Armistead, Stoneham I, and Poschman.
51. 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 8, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, p. B-13, typewritten version, p. 6.
52. See Poschman v. Dumke (1983) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603; and Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 203-204, 149 Cal.Rptr. 1, 3-4.
53. 1988 OAL Determination No. 3 (State Board of Control, March 7, 1988, Docket No. 87-009) California Regulatory Notice Register 88, No. 12-Z, March 18, 1988, pp. 855, 864; typewritten version, p. 10.
54. We wish to acknowledge the substantial contribution of Unit Legal Assistant Melvin Fong and Senior Legal Typist Tande'

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Montez in the processing of this Request and in the preparation of this Determination.